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No. 88-1128

In The Supreme Court of the United States

October Term, 1988

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,

v.

ANTONE FOLKINS, et al., Respondents.

On Writ of Certiorari
to the California Supreme Court

PETITIONER'S REPLY BRIEF

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The petitioner's reply brief is filed pursuant to Rule 22.5 of the Rules of the Supreme Court.

I. THE PETITION WAS TIMELY FILED.

Contrary to respondents' arguments, Res. Mattz Br., 25-32, Res. Folkins Br. 8-9, the petition was timely filed. A petition for writ of certiorari in a "civil" action must be filed within 90

days after entry of the judgment below. 28 U.S.C. § 2101. The case for which review is sought is a "civil" action because it consists of an original petition for writ of prohibition filed by respondents in the California Court of Appeal. Under California law, "[t]he application for a writ of mandate is a special proceeding of a civil nature." Jones v. Board of Police Commissioners, 141 Cal. 96, 98 (1903) (emphasis added); Deering, "California Administrative Mandamus," § 1.5, at 8.[1/] Petitions for writs of prohibition are governed by the same rules applicable to petitions for writs of mandamus, City Council v.

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1. Under California law, cases fall into two classes: (1) "actions" and "civil proceedings." Cal. Code of Civ. Proc. (CCP) § 21. An "action," in turn, consists of a "civil" or "criminal" proceeding. CCP § 24. A petition for writ of mandamus, on the other hand, is a "special proceeding of a civil nature." Jones, 141 Cal. at 98.

Superior Court, 272 Cal.App.2d 876, 881 (1969), and therefore a petition for writ of prohibition is also a "special proceeding of a civil nature." A petition for writ of prohibition is similar to a petition for writ of habeas corpus, and this Court has squarely held that a habeas corpus petition is a "civil" action. Riddle v. Dyche, 262 U.S. 333, 336 (1923) ("The writ of habeas corpus is not a proceeding in the original criminal prosecution but an independent civil suit"); Heflin v. United States, 358U.S. 415, 418 n. 7 (1959).

Therefore, the respondents' petition for writ of prohibition is a separate civil proceeding rather than part of the criminal proceeding. Since the petition for writ of certiorari was filed within 90 days after entry of

judgment below, the petition was timely filed.

II. THE QUESTION RAISED IN THE PETITION IS ONE OF FIRST IMPRESSION, AND THE PEOPLE ARE NOT BARRED FROM RAISING THE ISSUE HERE.

The respondents argue that the California courts have held on several occasions that Indians have federally-granted "reserved" fishing rights, and therefore that California is barred by res judicata from asserting its reserved rights argument here. Res. Mattz Br. 32-39; Res. Folkins Br. 13. In fact, as the petition and the states' amici brief make clear, the decision of the California Supreme Court below is the first to hold that Indians of the Klamath River have "reserved" fishing rights under federal law. Pet. 7, 15-17; Amici Curiae Brief

of States of Alaska, et al., 3-7.[2/]

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2. In People v. McCovey, 36 Cal.3d 517 (1984), the People asserted that the State has sovereign authority over navigable waters and therefore has the right to regulate Indian commercial fishing in the Klamath River. The California Supreme Court rejected the People's argument by assuming that the Indians have federally-granted fishing rights; on that assumption, the Court then held that the Secretary of the Interior's fishing regulations preempt California law as applied to Indians. Pet. 3 n. 2. Thus, the Court's preemption holding was based on the assumed premise that the Indians have "federally-granted" rights, and that premise is the issue raised here. Since the People raised this foundational issue in McCovey, and since McCovey did not specifically consider or decide the issue, the People cannot be barred by res judicata from asserting the issue in a separate proceeding involving different defendants and different transactions. Moreover, since the Secretary of the Interior's regulations are based on the premise that Indians have federally-granted fishing rights, the validity of the Secretary's regulations depend on whether the Indians in fact have such rights, which is the issue raised here.

In the other cases cited in the respondents' briefs, Res. Mattz Br. 35-36, the reserved rights issue was neither raised nor decided by the courts, and the decisions are devoid of any reference to the issue. Since California has the sovereign right to regulate the Klamath River fish resource unless Congress has

Indeed, to our knowledge, no court has ever held that the reserved rights doctrine authorizes the reservation of rights other than water rights. This Court has consistently applied the doctrine as a water rights doctrine only, and has never held or suggested that the doctrine extends beyond the water rights context. E.g., United States v. New Mexico, 438 U.S. 696, 698, 702 (1978) ("water rights"); Arizona v. California, 373 U.S. 546, 601 (1963) ("water rights"); Pet. 15-17. Further, the Solicitor of the Department of the Interior issued an opinion in 1891 declaring that the Indians of the Klamath River reservation do not possess

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"reserved" federal rights in the resource, the Indians' right to fish in violation of California law depends on whether Congress has "reserved" such rights for them. Prior to the decision below, no court has ever decided that question.

"reserved" fishing rights on reservations created after California's admission to statehood. Pet. 14. Additionally, the United States Attorney General issued an opinion in 1891, shortly before the creation of the Indian reservation in this case, to the same effect. Pet. 20.

Therefore, the California Supreme Court decision below is one of first impression, in that no court has ever held that the reserved rights doctrine authorizes the reservation of fishing rights. For this reason, California is not barred from asserting the reserved rights issue here. Moreover, because of the "presumption" that the state retains its sovereign "dominion" over navigable waters and underlying soils, California should not be precluded in any event from asserting its sovereign interests by

rules applicable to disputes between private litigants. Cf. United States v. California, 332 U.S. 19, 39-40 (1947) (holding that United States cannot be estopped from asserting jurisdiction over navigable waters within California's territorial limits, even though federal agencies acquiesced in local jurisdiction for many years).[3/]

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3. Contrary to respondent Folkins' argument, the People were entitled to raise their jurisdictional argument in the Superior Court proceeding to review the magistrate decision, since jurisdictional arguments can be raised for the first time on appeal. Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 665 (1937). Moreover, contrary to the respondent's argument that the People are attempting to raise "factual issues" at the appellate level that were not raised below, Res. Folkins Br. 10, the People have the right, in an original writ proceeding at the appellate level, to produce any official documents that can be judicially noticed and that are relevant to the jurisdictional issue. Cal. Evidence Code §§ 452(b), -(c), -(h), 459; Rule 323(b), Cal. Rules of Court.

III. THE CONTROVERSY IS NOT MOOT.

As respondent Folkins notes, the Superior Court dismissed the criminal actions against the respondents on February 17, 1989. Res. Folkins Br. 12. We concede that, if the dismissal of the criminal action renders the matter moot, this Court would lack jurisdiction under Article III of the United States Constitution to review the matter. E.g., Preiser v. Newkirk, 422 U.S. 395, 401 (1975). The issuance of a lower court's mandate, however, does not destroy this Court's jurisdiction to review the lower court's judgment, even where the mandate has been obeyed. Carr v. Zaja, 283 U.S. 52, 53 (1931); Aetna Casualty Co. v. Flowers, 330 U.S. 464, 467 (1947); see Louisiana & N.R. Co. v. Behlmar, 169 U.S. 644, 648 (1898). The result would be different if, as a result of the lower

court's mandate, this Court's decision would have no effect. Such is not the case here, however. If this Court reverses the California Supreme Court's judgment, the California Supreme Court would in effect be mandated to recall its remittitur, and the Superior Court would then be required to vacate its dismissal order. Since a California appellate court has the power to require that a dismissal order be vacated, Cal. Pen. Code § 1238, this Court is not deprived of jurisdiction under Article III by the issuance of such an order. Therefore, the controversy is not moot.

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CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

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